Introduction

I The setting

Human beings without human rights are a theoretical anomaly but a terrible reality in many societies. Autocratic rulers in ancient times, Leviathans of the Middle Ages, and modern States with an agglomeration of powers have all stood in the way of the effective realization of human rights. Historically, the violation of human rights in one form or another has been at the root of all strife and tyranny. However, in reaction to the heinous crimes that shocked the conscience of humankind in the wake of the two world wars, there have been major breakthroughs in the evolution of international norms and institutional mechanisms to safeguard human rights.

Although the move to safeguard human rights started late, once the process was initiated, it made significant progress even in the face of constraints and crises. It has helped bring about a world order with the presence of a visible and viable international legal system. The process has sought to ensure that the vagaries of power politics remain, to some degree, accountable to the rule of law. It has also consolidated and catalyzed the progressive development and codification of the international law of human rights. Everyone, from dreamer to diplomat, has come to appreciate the significance of human rights both in domestic life and in world politics. As a result, issues over the legitimacy, recognition and codification of human rights have now more or less been settled. The primary concerns today are fourfold: the implementation of human rights; the evolution of a new social contract between sovereign States and civil society for the promotion of human rights; the resolution of new human rights problems; and the incorporation of human rights philosophy into development strategies.

Few branches of jurisprudence have witnessed changes as momentous as those in the international law of human rights – so much so that even modern domestic legal systems, though customarily regarded
as model systems, look primitive at times by comparison. The inadequacies of domestic legal systems attract much more attention than the weaknesses of international law. Overcoming these shortcomings, in theory as well as in practice, is a concern of both international and domestic law. International law has evolved ways of promoting respect for human rights in keeping with the state of the world order. The UN human rights treaty system, which is an indispensable part and promoter of the global human rights movement, constitutes a significant aspect of this effort. By virtue of a number of normative and institutional factors, the International Covenant on Civil and Political Rights (ICCPR) spearheads the system for the promotion and protection of human rights. The ICCPR system includes the ICCPR as such, the first Optional Protocol to the International Covenant on Civil and Political Rights (the first ICCPR Protocol), the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (the ICCPR Second Protocol), as well as the Rules of Procedure adopted by the Human Rights Committee (HRCttee) for monitoring the implementation of these instruments.1

The ICCPR is ‘the pre-eminent UN human rights instrument setting standards for the world at large’;2 it stands at ‘the apex of human rights law’;3 it is ‘the flagship of the universal human rights protection’;4 and it has a comparative advantage over a host of human rights instruments.5 Even sceptics consider it one of ‘the most important legal instrument[s] in the hierarchy of international agreements’.6 It is the principal component of the International Bill of Rights, which commands widespread support.

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1 The ICCPR system represents certain subsystems and units. Individuals, groups of individuals, States, the HRCttee, the specialized agencies and the UN Secretary-General fall into the category of ‘units’. Three procedures – State reporting under Article 40 of the ICCPR, inter-State communications pursuant to Article 41 of the Covenant, and individual communications under the first ICCPR Protocol – represent ‘subsystems’.
6 Nasinovsky (USSR), Third Committee Records (1966), mtg 1433, para. 35.
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It makes up, largely, for the significant inadequacies of the international law of human rights. It is part of general international law.\(^7\) It occasionally finds pride of place in the applicable law of domestic courts,\(^8\) opinions of the International Court of Justice (ICJ)\(^9\) and decisions of international tribunals.\(^10\) A few States position the ICCPR as equal to the supreme law of the land;\(^11\) several others permit the Covenant to be directly invoked before their domestic courts;\(^12\) quite a few States have signalled Covenant recognition \textit{expressis verbis} in their constitutions;\(^13\) and, in a number of States, the Covenant takes precedence over domestic law.\(^14\) In the entire gamut of international agreements, there are but a few that have created obligations and established institutions to secure compliance of those obligations by the participants. The ICCPR is one such rare agreement. It is the \textit{fons et origo} of the HRCttee. Most important, it embodies the reasonable expectations of innumerable individuals.

The significance of the study of the law and practice of the HRCttee derives from the fact that this body is the monitor of the functioning of the ICCPR system. Regarded as ‘the most important organ striving for the universal enforcement of human rights within the framework of the United Nations’,\(^15\) ‘the flagship of the United Nations human rights treaty bodies’\(^16\) and ‘the universalist counterpart to regional organs’, such as the European Court of Human Rights,\(^17\) the HRCttee holds an unrivalled


\(\text{\textsuperscript{9}}\) See, among others, the \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case, ICJ Reports 2004}, pp. 172 (para. 88), 177–80 (paras 103 and 105–12), 187–8 (paras 127–9) and 192–3 (paras 134 and 136) (hereinafter the \textit{Palestinian Wall} case).

\(\text{\textsuperscript{10}}\) See, e.g., \textit{Barayagwiza, supra} n. 7.


\(\text{\textsuperscript{16}}\) Thomas Buergenthal, UN Doc. CCPR/C/SR.1554/Add.1 (11 November 1996), para. 10.

\(\text{\textsuperscript{17}}\) Editorial Preface by Ian Brownlie to McGoldrick, \textit{supra} n. 5.
position. Led by the HRCttee, the ICCPR system has taken ‘the world into the twenty-first century with the most serious machinery ever for the realization of human rights’.18 This is a major development in the process of international organization deserving serious treatment.

II Objective of the study

There is a large body of literature dealing with human rights. Also, of all the UN human rights treaty bodies, the HRCttee has received ‘the greatest share of scholarly attention’.19 Although several scholars have made an impressive contribution to the development of this literature,20 most of the writings on the HRCttee are fragmentary in the sense that they deal only with one aspect or another of the subject matter21 and only a few of them claim to be comprehensive. Not many writings take into account

21 See bibliographies in Boerefijn, supra n. 20, pp. 393–8; Ghandhi, supra n. 20, pp. 429–45; McGoldrick, supra n. 5, pp. 536–67; Möller and de Zayas, supra n. 20, pp. 541–56; Nowak, supra n. 20, pp. 1245–58; and Young, supra n. 20, pp. 335–42.
the attitudes of developing countries towards the HRCttee, few deal with the premier human rights body from a general international law perspective, and even fewer look at the body in the light of the situation emerging after the attacks on the World Trade Center in New York and the Pentagon in Washington, DC, on 11 September 2001 (commonly known as 9/11). Concisely, literature on the law, policies, procedures and practices of the HRCttee is neither adequate nor up-to-date. This is not an indication of indifference towards the HRCttee. On the contrary, the utility of the HRCttee is evident from the participation of more than 160 sovereign States in its implementation system and its accessibility to millions of individuals. Clearly, human rights literature is incomplete without a comprehensive study of the HRCttee in the light of historical settings, contemporary challenges and different perspectives. The present study seeks to reduce this gap.

This study examines the law governing the HRCttee as an international institution for the promotion and protection of human rights in the States that are parties to the ICCPR, as well as the HRCttee’s practice and its place in the international system. In addition to other institutions, the United Nations itself has felt the need for such an appraisal, since this would help scrutinize, publicize and popularize the role of the HRCttee and the achievements of the Organization in the field of human rights. A periodic appraisal of the performance, problems and potentialities of an international organization is necessary to renew the intellectual interest of the international community in that organization, to ensure the organization’s public accountability, and to strengthen its role in the international system. Furthermore, the ICCPR has been in existence for more than four decades, in force for more than thirty years, and accepted by more than 160 States across the world with diverse ideologies and socio-political systems. As the monitor of the ICCPR, the HRCttee has been in operation for more than three decades. It has received, considered and commented on almost 400 reports from States on their respective human rights situations. It has adopted ‘Concluding Observations’ on more than 225 State reports. It has produced more than thirty ‘General Comments’ on the various provisions of the ICCPR as a new body of ‘soft law’. It has also registered almost two thousand individual communications alleging violations of human rights in more than eighty States from Africa, Asia, Europe and the Americas, and has expressed ‘Views’ on the merits of more than 700 such cases. This corpus of human rights practice itself represents considerable development and justifies the need for an analysis, evaluation and formulation of policy guidelines.
Since its inception, the HRCttee has seen the rise and decline of the Cold War; the rise, decline and revival of détente; the erosion, evolution and manipulation of multilateralism; and the political revival of, and reaffirmation of faith in, the United Nations amidst multiple crises. It has witnessed a movement for gender sensitization of international institutions; the process of globalization with a curious mix of idealism and nihilism; the impact of the war against terrorism on human rights; and the quest for a new role of human rights bodies in the world order. It is instructive to study how the HRCttee has coped with these developments in international relations and what role it can play in shaping a new world order. In the process of analysing the law and practice of the HRCttee, an attempt will be made to examine a number of concepts that are ingrained in the ICCPR system and applied in the general body of international law, so that one may assess their contribution to the international system. This will also help in determining whether human rights treaties ultimately make any difference.

It is hoped that this study will assist (a) States that are parties to the ICCPR and the Optional Protocols thereto to have a better understanding of their rights and obligations under the Covenant system; (b) States that are not parties to the Covenant or the Optional Protocols thereto to make a decision on the question of joining the system; (c) individuals who may wish to utilize the HRCttee’s procedures; and (d) human rights activists, non-governmental organizations (NGOs) and other entities in civil society to explore additional avenues for their activity. Further, the study may make the HRCttee’s work more widely known in the international community. In the process, it also aims at enriching literature, increasing awareness and fostering faith in the philosophy of human rights.

### III Methodology

The present study follows an analytical approach. It makes use of historical records, empirical evidence and scholarly opinion. It considers the position of sovereign States no less important than that of civil society. It is sensitive to the viewpoint of the developing world, but has no ideological bias. It recognizes the interplay of law and politics as well as that of law and morality. It does not treat human rights as an embodiment of neutral values, because their legally recognized formulations are the products of highly politicized processes. It considers the politicization of human rights inevitable, but detests the dominance of any power bloc in
human rights diplomacy. It finds the dominance of certain interests in the human rights world, but does not discern any conspiracy in the evolution of human rights jurisprudence. It prefers the process of international organization and harbours a deep faith in the sustained development of human rights.

As the basic focus of the study is the ICCPR system and the role of the HRCttee in that system, it seeks to examine, first, the conditions in which the system was conceived and the framework within which it was meant to operate; secondly, the manner in which the system has functioned; thirdly, the problems and potentialities of the system; and, finally, the ways in which it may be strengthened. It attempts to analyse the legislative history of the ICCPR and the first Optional Protocol, starting with the initiatives taken by the former UN Commission on Human Rights (CHR) and the proposals considered in the Third (Social, Humanitarian and Cultural) Committee of the UN General Assembly (the Third Committee) and in the Assembly itself. It seeks to examine the provisions of the ICCPR in the light of its legislative history, the practice of the HRCttee, scholarly opinion, and the available jurisprudence of comparable institutions. Besides analysing the reports of States parties to the ICCPR, the study evaluates general comments, views, decisions and annual reports of the HRCttee, as well as individual opinions of its members. It takes into account the relevant recommendations of the General Assembly, especially the Third Committee, and other important bodies.

Although official documents are the mainstay of the present study, it is also based on various other sources of information, including interviews with several members of the HRCttee, staff of the Secretariat of this body, and some experts who took part in the drafting of the ICCPR and the first Optional Protocol. It has benefitted from interviews with a few authors of communications to the HRCttee, a handful of attorneys who have assisted individuals in presenting their cases before the Committee, and prominent NGOs that have taken an interest in the Committee’s functioning. Its content is enriched by interaction with delegations of some of the States parties to the ICCPR who presented State reports before the HRCttee, representatives of a few specialized agencies that have observed the functioning of the Committee, and officials of some of the expert bodies of the UN system whose functions are similar to those of the Committee.

Where relevant, the study offers a comparison between the HRCttee and other UN human rights treaty bodies, as well as between the Committee
and the leading regional human rights institutions. Such comparisons help develop a healthier perspective of human rights. Lastly, the analysis indicates that law and politics are not isolated from each other; rather, their interaction, particularly in the realm of international law, is a fact.

The study takes into account the travaux préparatoires of both the ICCPR and the first Optional Protocol when examining the provisions of these instruments, given that Article 32 of the 1969 Vienna Convention on the Law of Treaties refers to the travaux as a ‘supplementary means’ of interpretation. The travaux préparatoires are reasonably authentic, well documented, and easily accessible. They help clarify not only the original intent of the drafters of the ICCPR and the first Optional Protocol but also the fundamental factors that shaped their normative expectations. They offer guidance wherever the natural and ordinary meanings of the words in these instruments are not clear. They enable us to make a comprehensive scrutiny of these two instruments. They establish the link between the thinking processes of the past and the present, and also between what was originally intended and what is being practised. The travaux often provide a basis for individuals and States to stake their claims and counter-claims in the proceedings before the HRCttee.

The HRCttee itself has recognized the importance of the travaux préparatoires. Its experience has been that the task of the monitoring bodies has been facilitated by access to the travaux. As a matter of policy, human rights experts attach great significance to the travaux in general. Commentators assess the role of the HRCttee in the light of the

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24 In Waldman v. Canada (Comm. No. 694/1996), for instance, Canada relied on the travaux préparatoires to refute the allegation of discrimination in the distribution of subsidies to schools on the basis of religion. See HRCttee 2000 Report II, Annex IX.H, pp. 91 (para. 4.4.1) and 93 (para. 4.6.1).

25 Higgins, UN Doc. CCPR/C/SR.997 (30 July 1990), para. 73.

26 The fourth meeting of the chairpersons of the UN human rights treaty bodies, held on 12 to 16 October 1992, recommended: 'Whenever new human rights instruments are being drafted, adequate travaux préparatoires should be undertaken.' See A/47/628, para. 69.
travaux. They often refer to the travaux for the interpretation of human rights. The ICJ also refers to the travaux in its opinions. Even some domestic courts have based their decisions on the travaux. A travaux-conscious interpretation of human rights terms and concepts appears to be more acceptable to a majority of the States parties to the ICCPR as well as to the members of the HRCtte. It is a legitimate defence against those who want to restructure the ICCPR system without the consent of States parties.

Frequent references to the travaux préparatoires in the present study might give the impression that ‘supplementary means’ have been used as a prominent means of interpretation. However, such references are essentially a methodological response to the persistent disregard of the conceptual framework of international measures of implementation in contemporary thought. It does not undermine the understanding of the International Law Commission that ‘the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties’. It seeks to emphasize the need to balance continuity and change in the ICCPR system in view of the arduous consensus of yesterday and the ambitious propositions of today. The use of the travaux préparatoires may help moderate the rising expectations from the system.

Initially, neither the HRCtte nor States nor individuals displayed much enthusiasm about the use of the travaux préparatoires as an aid to the interpretation of the provisions of the ICCPR and the first Optional Protocol. At best, a few members of the HRCtte referred to the travaux at the time of consideration of State reports under Article 40 of the


29 See, e.g., the Palestinian Wall case, *supra* n. 9, p. 179, para. 109.


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ICCPR. This attitude changed with the Alberta Union case and the Dutch Social Security cases in the mid-1980s. In these cases, the HRCttee made extensive use of the travaux in an attempt to understand the precise scope of the rights and freedoms recognized in the ICCPR, to arrive at a tenable interpretation of these rights and freedoms, and to comprehend its own limitations. Interestingly, the HRCttee has invoked the travaux increasingly in the context of substantive law rather than procedural law. Since the present study is primarily concerned with procedural law, it makes use of the travaux in that context.

IV Scope of the study

Any study of human rights should begin with a clarification of the concepts involved. The concept of human rights has at times been distorted, deliberately or otherwise, for different reasons. Insufficient attention has been paid to the conceptual aspects of international measures for the implementation of human rights. What are the basic tenets of the theory of international implementation of human rights? How does this theory influence the ICCPR system? Where does the ICCPR system stand in the international system? How does it differ from other human rights systems? What are the characteristics of the HRCttee? Is there a class character to it? What is its international personality? These questions need to be clarified before specific aspects of the law and practice of the HRCttee are analysed. A justification for this caveat lies in Leninist wisdom: ‘Anybody who tackles partial problems without having previously settled general problems, will inevitably and at every step “come up against” those general problems without himself realizing it.’ For this reason, chapter 1 of the present study deals with the conceptual framework of the HRCttee and, in the process, explains some commonly used terms, such as ‘accountability’, ‘cooperation’ and ‘effectiveness’.

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32 For instance, during the consideration of the initial report of France in July 1983, one member of the HRCttee asked the State delegation what guarantees existed in that State against arbitrary detention; in doing so, the member referred to the travaux préparatoires. See HRCttee 1983 Report, p. 71, para. 303.

